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CASE NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

STATE OF OHIO,

Petitioner,

v.

HARRY C. DENUNE, et al.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, BUTLER COUNTY, OHIO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE NECESSITY OF PREVENTING A RELEASE OF HAZARDOUS CHEMICALS INTO AN ENVIRONMENTALLY SENSITIVE AREA CONSTITUTES EXIGENT CIRCUMSTANCES WHICH AUTHORIZES A WARRANTLESS ENTRY.

II. WHETHER PROBABLE CAUSE FOR A WARRANTLESS ENTRY EXISTS, IF A STATE REGULATORY INSPECTOR HAS KNOWLEDGE THAT EVIDENCE OF CRIME "MAY", AS OPPOSED TO "WILL", BE PRESENT.

III. WHETHER KNOWLEDGE OBTAINED DURING A CONSENTUAL ENTRY CONDUCTED SUBSEQUENT TO A WARRANTLESS ENTRY OF AN ADJACENT LOCATION IS AN "INDEPENDENT SOURCE" UPON WHICH PROBABLE CAUSE FOR A LATER WARRANT MAY BE BASED.

IV. WHETHER AN INDIVIDUAL MAY ASSERT, AS HIS OWN, THE FOURTH AMENDMENT PRIVILEGE OF A CORPORATION, BASED SOLELY UPON THE DEGREE OF OWNERSHIP AND CONTROL THE INDIVIDUAL HAS OVER THE CORPORATION, AND NOT THE PRIVACY INTEREST OF THE INDIVIDUAL IN THE PROPERTY SEIZED.

PARTIES TO THE PROCEEDINGS

The parties are the State of Ohio as the Petitioner; Harry C. Denune and Dixie Distributing, Inc., as Respondents.

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OPINIONS BELOW

The opinion of the Court of Appeals of Butler County in *State of Ohio v. Harry C. Denune*, et al., Case Nos. CA90-07-128, CA90-07-129, CA Butler County (Opinion, 9/21/92), is reported as *State v. Denune* (1992) 82 Ohio App 3d 497, and is reprinted at page A-2 of the Appendix.

The Entry of the Ohio Supreme Court in Case No. 92-2281, *State of Ohio v. Harry C. Denune*, et al., (1/27/93) declining to review the case, is unreported and is reprinted at page A-1 of the Appendix.

A subsequent Ohio Supreme Court entry (3/17/93) denying rehearing in the same case, is unreported and reprinted at page A-25 of the Appendix.

JURISDICTION

The judgment of the State Court of Appeals, by 2-1 vote, reversing the Defendants' criminal convictions on the basis of the Fourth Amendment to the Constitution was entered on September 21, 1992. (Appendix A-2). On January 27, 1993, the Ohio Supreme Court, by 4-3 vote, denied the State's Motion for Leave to Appeal, holding there was no substantial constitutional question involved. (Appendix A-1). A petition for rehearing, again by 4-3 vote, was denied on March 17, 1993. (Appendix A-25). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

This case involves important issues of Fourth Amendment law, arising in the context of searches which discovered leaking hazardous chemicals in an environmentally sensitive area. The issues include whether exigent circumstances exist upon a showing of a potential environmental disaster; whether probable cause exists upon a reasonable belief that evidence of crime may, as opposed to will, be present; whether subsequent consentual searches may remove the taint of an alleged improper prior warrantless entry into an adjacent area; and whether an individual may challenge evidence incriminating the individual simply because the search involves a corporation over which the person exercises sole ownership and control.

Evidence was seized in the course of four (4) separate searches of seven (7) independently locked box trailers containing toxic and hazardous wastes stored at a salvage yard called Canal Auto & Truck (CA&T). CA&T is located on a flood plain between a river and residental area, immediately next to and upstream from a wildlife refuge in Butler County, Ohio.

The first entry involved the emergency warrantless entry of a single box trailer on November 10, 1988. The court below found that the entry of this trailer tainted the later searches involving the other six (6) independently locked trailers.[1]

[1] The motion to suppress in the trial court related only to the initial warrantless entry. The Court of Appeals *sua sponte* raised the issue of the invalidity of the subsequent search, conducted pursuant to a warrant, of six (6) additional independently locked trailers. Because the trial court did not have the issue before it on motion to suppress, there are no factual findings regarding the intervening consentual searches of the additional trailers which the State asserts eliminates any nexus between the initial warrantless search and the later search with a warrant. *See* Argument, Section III. While the appellate court raised the fruit of the poisonous tree doctrine on its own, the appellate court ignored the independence of the subsequent consentual searches. References in the trial transcript establish the factual basis upon which independence of the nexus is asserted. Moreover, the factual basis demonstrating the subsequent consentual entries was presented to the appellate court at oral argument and in writing after the argument.

The Ohio Environmental Protection Agency (OEPA or Ohio EPA) had scheduled an inspection of the property of Dixie Distributing, Inc. (Dixie), in Springfield, Ohio, for November 10, 1988. However, on November 9, 1988, OEPA received an anonymous telephone call indicating that a tractor-trailer containing polycholorinated biphenyls (PCB's), a dangerous carcinogen, would be moved from Dixie's warehouse immediately before the scheduled inspection to avoid detection.

Based on the tip, the Springfield City Fire Department initiated a surveillance of the warehouse. The OEPA inspectors arrived before dawn on the morning of November 10, 1988 to continue the surveillance. The fire department officials informed the OEPA inspectors that they had observed what appeared to be 55 gallon drums or transformers being loaded into the back of the suspect trailer.

The trailer then departed and began a two hour journey on Interstate 75 to Butler County, Ohio. William Palmer, an Ohio EPA inspector, followed the trailer from Springfield to Butler County. When the trailer exited I-75, it turned down a hill on a bumpy dirt road into the CA&T lot where it parked next to six (6) additional trailers owned by Dixie.

The bumpy, unpaved dirt road caused great concern in Inspector Palmer's mind. He knew that the informant had claimed that PCB's were in the back of the truck and, as a aquatic toxicologist, he knew how dangerous PCB's could be. But, he had no idea whether the drums or transformers had been properly secured for the journey so as to prevent a spill. As he observed, immediately surrounding the storage yard were a residential area, a river, and a wildlife refuge. Moreover, the location itself was identified as an area subject to flooding, a flood plain. At the suppression hearing, Inspector Palmer explained his actions as follows:

> "So we felt, based on everything we had, that we had to inspect that trailer to prevent a release. *Our major objective was to prevent a release.* We didn't know if he had anything secured in the trailer. He

> went down the hill on a bumpy road. Possibly whatever was on there had tipped over or was leaking, we didn't know. And so that was our major . . . our major purpose at that point was to . . . to inspect that trailer so we could prevent a release before it happened, because any . . . any measures that would . . . that you need to take after the release had happened our [sic] much greater. (emphasis supplied). (Motion Hearing Tr. p. 39).

As a result, Palmer contacted the on-site manager for CA&T and obtained permission from the owner of CA&T to enter the premises and inspect the suspect PCB trailer. The six (6) trailers that were already on the lot right next to the suspect PCB trailer were each locked, but had large holes in the sides of their walls. Palmer looked through the holes and observed 55-gallon drums which are containers commonly used to store hazardous wastes. However, the CA&T on-site manager told Palmer the trailers were only supposed to contain machines.

Despite the fact that Palmer's observation of the drums disclosed the fact that Dixie had lied about the contents of the trailers to the CA&T personnel, Palmer made no attempt to open, enter, inspect or search the six (6) trailers. However, the presence of the drums of chemicals in the additional trailers combined with Palmer's prior knowledge that Dixie had previously stored leaking drums of hazardous waste in Dixie's Springfield warehouses served to reinforce his concern and belief about the contents of the newly-arrived trailer, as well as the likelihood of a PCB spill inside it due to the journey down the bumpy, unpaved road. Thus, Palmer opened that trailer. When he did, he saw ten (10) transformers (which usually contain PCB's) and one 55-gallon drum of an oily substance which later tests disclosed contained PCB's. While Inspector Palmer could see the transformers were leaking small amounts inside the trailer, the extent of the leaks inside the trailer did not require any immediate emergency action, and Palmer departed.

On November 14, 1988, four (4) days after the initial emergency warrantless entry of the suspected PCB trailer, OEPA inspectors entered the six (6) additional trailers with Dixie's *consent.* In fact, Dixie's attorney gave Ohio EPA inspectors *both* consent and the keys to enter the trailers. Dixie, through its attorney, again consented to the entry of the trailers on November 15, 1988.

After the November 15th entry, Dixie withdrew its consent. The State obtained a search warrant on December 1, 1988. The affidavits in support of the warrant were based solely upon observations of hazardous wastes made during the consentual entry on November 15th. In fact, the affiants for the warrant were not even present during the emergency warrantless entry into the suspected PCB trailer on November 10th.

Harry Denune and Dixie Distributing were indicted on September 11, 1989, for *inter alia,* the illegal transportation and storage of hazardous waste, felonies under Ohio's environmental laws.

On April 2, 1990, the trial court held a suppression hearing on the Defendants' motion to suppress the evidence obtained in the warrantless entry of the single trailer on November 10th. The Defendants stipulated that Dixie owned the trailer searched on November 10th. However, the trial court found that Defendant Denune did not have standing to challenge the emergency inspection.

The trial court held that probable cause *and* exigent circumstances existed and justified the warrantless entry of the trailer on November 10, 1988 (A-23, A-24). Dixie and Denune were subsequently found guilty of various environmental crimes by a jury.

The appellate court, by 2-1 vote, reversed both Defendant Dixie's and Denune's convictions. The court held that Defendant Denune demonstrated an independent privacy interest in the searched property because he was the sole owner of Defendant Dixie, and had sole control over Dixie's

operation (A-7, A-8). The court held that the November 10th warrantless entry of the suspect PCB trailer was not justified under the Fourth Amendment by probable cause and exigent circumstances. (A-13) The court also flatly ignored the effect of two intervening consentual inspections of the additional six (6) trailers, erroneously holding that evidence gathered during the later search that was conducted with a warrant of the six (6) additional trailers was a "fruit of the poisonous tree." Judge Young dissented, rejecting the expansion of the "fruit of the poisonous tree" doctrine to the evidence observed during the entries that occurred after the emergency warrantless entry, and found there was sufficient evidence to find both probable cause and exigent circumstances. (A-20, A-21)

The Ohio Supreme Court, by 4-3 vote, did not agree to hear the case, and rehearing was denied, again by 4-3 vote.

ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

I. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT POTENTIAL INJURY TO THE ENVIRONMENT CONSTITUTES EXIGENT CIRCUMSTANCES WHICH AUTHORIZE A WARRANTLESS ENTRY.

Certainly one of the most dynamic areas of law during the 1990's is the rapid criminalization of environmental law. While environmental regulation has traditionally been thought of as a civil or administrative regulatory matter, in the mid to late 1980's an increased effort began to enforce environmental laws through the criminal, rather than civil, process. *See*, Habicht, "The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side", 17 *Environmental Law Reporter* 10478 (1987). As a result, a potential conflict has emerged between the role of environmental administrative agencies with the mandate to prevent environmental harm from occurring and the role of the environmental crimes investigator in gathering evidence against those who commit the environmental crimes.

The facts of the instant case vividly indicate the tension between this dual role an environmental agency is required to perform. An environmental regulator acted quickly to prevent what he, in good faith, believed to be the potential for a spill of hazardous chemicals into the environment. More than two years later, with hindsight, the majority of an Ohio Court of Appeals panel decided that the inspector's entry to prevent the spill was not justified by exigent circumstances. The court held that the warrantless entry violated the Fourth Amendment and suppressed the evidence obtained as a result of a subsequent search warrant as a tainted "fruit of the poisonous tree." The court then reversed the convictions of the individual and the corporation responsible for the unlawful transportation, storage and disposal of the hazardous waste.

The first among several compelling constitutional questions presented for review by this case is whether a potential release or spill of hazardous chemicals to an environmentally sensitive area constitutes an exigent circumstance which authorizes a warrantless entry.

In *Michigan v. Tyler,* 436 U.S. 479 (1978), this Court explicitly recognized that warrantless entries or searches are constitutionally permissible in those situations where there is an emergency which requires immediate action. The Court defined an "exigent circumstance" as a situation in which " . . . there is a compelling need for official action and no time to secure a warrant." *Id.* at 509. This Court specifically recognized that regulatory agencies may have a need to initiate "prompt inspections even without a warrant . . . in an emergency situation." *Id.* The Court cited with approval its prior holding in *Camara v. Municipal Court,* 387 U.S. 523, 539 (1967), in which the Court detailed the long-line of prior decisions approving emergency actions taken for regulatory, non-criminal purposes without a warrant. Indeed, even within the context of a criminal case, this Court declared that:

> [T]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.

Mincey v. Arizona, 437 U.S. 385, 392 (1978).

In *Tyler, supra*, this Court overturned in part a state court decision which precluded the use of evidence concerning arson which was gathered by firefighters as they attempted to determine the cause of a fire during the time they battled that fire and during a very brief period after the flames had been extinguished. This Court emphasized that determining the cause of the fire was a perfectly legitimate part of the firefighters' duty to contain the fire. The fact that the search for the cause of the fire uncovered evidence of arson, did not in any way invalidate the warrantless search for the cause of the fire. See, *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Federal courts have consistently allowed the use in criminal prosecutions of evidence observed as a result of a warrantless search or inspection that was initiated for emergency, non-criminal investigatory purposes. For example, drownings: *United States v. Zurosky*, 614 F.2d 779, 785 (1st Cir. 1979), *cert. denied*, 446 U.S. 967 (1980); *United States v. Miller*, 589 F.2d 1117, 1126 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); *United States v. Sullivan*, 544 F.Supp. 701, 717 (D.Me. 1982); the prevention of bombs being placed on airplanes: *United States v. Homberg*, 546 F.2d 1350, 1353 (9th Cir. 1977), *cert. denied*, 431 U.S. 940 (1977); *United States v. Legato*, 480 F.2d 408, 410 (5th Cir. 1973), *cert. denied*, 414 U.S. 979 (1973).

Even within the context of a criminal investigation, the use of evidence obtained as a result of searches or inspections taken to prevent potential harm from fires and bombs or other types of explosives has been repeatedly approved. *United States v. Lindsey*, 877 F.2d 777, 781-782 (9th Cir. 1989); *United States v. Al-Azzawy*, 784 F.2d 890, 895 (1985), *cert. denied*, 475 U.S. 1144 (1986); *United States v. Urban*, 710 F.2d 276, 277 (6th Cir. 1983); *United States v. Williams*, 626 F.2d 697, 703 (9th Cir. 1980), *cert. denied*, 449 U.S. 1020 (1980); *United States v. Callabrass*, 607 F.2d 559, 564 (2nd Cir., 1979), *cert. denied*, 446 U.S. 940 (1980); *United States v. Moskow*, 588 F.2d 882 (3rd Cir. 1978); and

United States v. Johnson, 524 F.Supp. 199, 204 (D. Del. 1981).

Inspector Palmer's actions were dictated by the exigent circumstances he faced based upon the facts he had available to him at that time. Because he did not know whether the PCB materials inside the truck had been secured so as to prevent spillage, he was convinced that there was a severe potential for a spill of PCB's which could have been disastrous in light of the environmental sensitivity of the surrounding area, including a river, a wildlife sanctuary, and a residential area. As Palmer testified:

> *** . . . when we have to look at the set of circumstances we were faced with there . . . he pulls down onto a flood plain. We've got a residential area right up on a hill, it's right beside a river, and immediately south of the salvage yard there's a wildlife refuge . . . and the complainant said we were dealing with PCB's and this . . . PCB's are something you . . . you definitely don't want to be released in the environment for a couple of reasons. (1) they are incredibly persistent. Once they get into the environment, they just don't break down. They'll be there for years. And (2) if they get into the food chain, *they bio-accumulate*, they go up through the food chain. (emphasis original). (Motion Hearing Tr. pp. 38-39).

Moreover the inspector's conduct was completely consistent with this Court's admonition in *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968), that a search must be " . . . strictly circumscribed by the exigencies which justify its initiation." Palmer opened the suspect PCB trailer, observed that the amount of materials which had leaked into the interior of the trailer was minimal, *and retreated.* All further activity taken to search the additional six (6) trailers that contained all the evidence of hazardous wastes at CA&T was done either with consent or pursuant to the search warrant issued on December 1, 1988.

A. EXIGENT CIRCUMSTANCES SHOULD BE DEFINED AS A GOOD FAITH RESPONSE TO CIRCUMSTANCES KNOWN AT THE TIME OF THE WARRANTLESS ENTRY, AND NOT JUDGED FROM HINDSIGHT.

The court below expressed the opinion that since the trailer was not actually leaking, there was no emergency. (A-13) Hindsight, however, is not the basis for judging the existence of exigent circumstances. *Terry v. Ohio, supra,* at 21-22; *United States v. Lindsey, supra,* at 781-782; *United States v. Licata,* 761 F.2d 537, 543 (9th Cir. 1989); *United States v. Sullivan, supra,* at 718. Rather, whether an exigent circumstance exists, ". . . must be judged from the circumstance known . . . *prior* to the warrantless action." *Lindsey, supra,* at 782 (emphasis original). In *United States v. Williams, supra,* and *United States v. Legato, supra,* police officers who were searching for bombs were mistaken. They found no bomb, but they did find evidence of a crime. However, that did not negate the validity of their actions taken in light of their perception that exigent circumstances existed at the time they acted.

In recent cases, this Court adopted a good faith exception to the exclusionary rule. In *United States v. Leon,* 468 U.S. 897 (1984), the Court applied the exception to good faith reliance on an improperly expired search warrant. In *Illinois v. Krull,* 480 U.S. 340 (1986) the exception was applied to evidence seized without a warrant pursuant to an unconstitutional statute allowing such warrantless inspections. In *Illinois v. Rodriguez,* 497 U.S. 177 (1990), the Court found an erroneous, but good faith factual determination as to consent by a third party to be sufficient. In each of these situations, the Court recognized that the public policy of deterring police officers' misconduct would not be advanced by imposing the exclusionary sanction.

Clearly, good faith is an inherent component of exigent circumstances. The reversal of a good faith belief that existed at the time of an emergency entry that an exigency exists does not serve the purposes of the exclusionary rule. As

such, the good faith component of exigency should be judged from the accumulated knowledge of the person at the time of the event, and not as the court below has done here, by hindsight.

In this case, Inspector Palmer made his entry into the trailer because of his concern about the tremendous potential consequences, and difficulty of containment, which would result after a leak of PCB's escaped the trailer. The fact that he immediately retreated after he determined that there was no significant threat of a release further underscores the limited nature of his entry. Inspector Palmer's good faith is illustrated by the fact that he first sought permission from the CA&T owner. While the court of appeals found the owner could not give consent, the attempt to get consent from a responsible person was made by the inspector prior to any action.

Additionally, Inspector Palmer had also contacted his supervisor prior to the entry and been advised of other circumstances in which a prior investigation uncovered drums of hazardous waste that had been improperly stored by Dixie in Springfield, the origin of the suspect PCB trailer. Finally, his interview of the CA&T on-site manager disclosed that Dixie had lied about the contents of the trailers at CA&T. The lie was exposed when the 55-gallon drums, instead of machines, were observed through the holes in the six (6) additional trailers. This reinforced the inspector's concern that unstable toxic chemicals were present in the suspect PCB trailer.

Finally, Palmer had not acted previous to the trailer's arrival at CA&T because, not being a law enforcement officer, he had no power to stop the trailer while moving. Thus, while the trailer was disconnected from the tractor at the CA&T lot, its potential mobility was a factor to consider. Diminished privacy interests associated with vehicles may justify a warrantless intrusion even if the possibility of movement is remote, if not nonexistent. *United States v. Chadwick*, 433 U.S. 1, 12 (1977). Thus, it is the high degree of *potential* mobility which justifies a prompt search, *not the actual*

mobility of the vehicle. In fact, several courts have recognized sufficient exigency when a vehicle has been abandoned or parked. See, *United States v. Helberg,* 565 F.2d 993 (8th Cir. 1977); *United States v. Farnkoff,* 535 F.2d 661 (1st Cir. 1976); *Clark v. State,* 574 P.2d 1261 (Alas. 1978). If, while obtaining a warrant, the suspect trailer resumed its travels, the inspector would not have been able to stop the trailer even if it was actually leaking onto the road, much less to determine if an immediate release of toxic chemicals was imminent.

B. EXIGENT CIRCUMSTANCES DO NOT REQUIRE STATE AGENTS TO WAIT FOR ACTUAL HARM TO OCCUR BEFORE CONDUCTING A WARRANTLESS ENTRY TO DETERMINE THE NATURE AND EXTENT OF A POTENTIAL DANGER.

The appellate court held that an observable leak was necessary to create exigent circumstances (A-13). The Court below thus required that actual harm must exist. In this case, a limited warrantless entry was made to determine the nature and extent of a danger and to avoid a reasonably believed potential of danger. Besides being inconsistent with, and contrary to, this Court's recognition that the *potential* for harm may create an exigency, the appellate court's requirement, in and of itself, poses a threat to the public. The appellate court would require the government to stand by and allow the public to suffer what may be an irreversible injury before any limited action to protect the public safety could be taken.

No one would suggest that police or fire fighters must let a bomb explode before trying to deal with it. Nor would anyone suggest that they should let a fire consume a building before attempting to enter to control that fire. When applied within the context of environmental law, the same result should occur.

In the instant case the inspector acted reasonably. He did what the public expects environmental regulators to do: he acted to prevent a possible disaster. Indeed, the public would

be relieved if many of our nation's greatest environmental disasters, from Love Canal to the Exxon Valdez, had been prevented by the diligent action of environmental officials rather than waiting for the disasters to occur and trying to cleanup or contain the results of that contamination. There should be no penalty imposed upon the public, or reward given to the environmental criminal, because an inspector acted as a protector of the environment.

II. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT PROBABLE CAUSE FOR A WARRANTLESS ENTRY EXISTS, IF A STATE REGULATORY INSPECTOR HAS KNOWLEDGE THAT EVIDENCE OF CRIME "MAY", AS OPPOSED TO "WILL," BE FOUND.

The determination of probable cause requires an examination of the totality of the circumstances to make a practical, common-sense decision whether, given all the circumstances, there is a *fair probability* that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). (emphasis added). That decision must be made in light of the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Brinegar v. United States,* 338 U.S. 160, 175 (1949); *United States v. Head,* 693 F.2d 353, 357 (5th Cir. 1982). Thus, the evidence pertaining to probable cause must be viewed in the light most favorable to the government. *Glasser v. United States,* 315 U.S. 60 (1942); *United States v. Watkins,* 662 F.2d 1090, 1096 (4th Cir. 1981).

Independent of exigent circumstances, but based upon many of the same facts, Inspector Palmer also had "probable cause" to open the suspected PCB trailer. This was recognized by the trial court as well as Judge Young in his dissent in the court below. The EPA inspector knew that the suspect PCB trailer was loaded with what appeared to be drums or transformers, and that such loading occurred on the day immediately prior to a scheduled PCB inspection. This corroborated the anonymous tip the State had received

that the PCB's were going to be moved to specifically avoid the scheduled inspection. When the trailer was loaded the containers did not appear to have been secured. The loaded trailer was then transported on a long trip that ended by going down a hill on a bumpy dirt road. The trailer was then parked on an environmentally sensitive area on a flood plain next to a residential area. The trailer parked next to six (6) other trailers belonging to the same owner. The exterior inspection of the additional trailers disclosed 55-gallon drums that could be seen through holes in the trailers. The owner of the trailers was already under investigation for improperly storing drums of hazardous waste in Springfield, the origin of the suspect PCB trailer. Moreover, the inspector's interview of CA&T representative disclosed that the Defendant had lied to CA&T concerning the supposed contents of the trailers, as disclosed by the presence of drums that were seen through the holes in the additional trailers instead of machines or machine parts. A prudent EPA inspector could reasonably, and in good faith, believe there was a "fair probability" of evidence of crime or contraband in the suspect PCB trailer in the CA&T lot.

The analysis performed by the appellate court imposed a requirement that law enforcement officers establish "concrete reasons" in order to demonstrate probable cause. The appellate court stated, "[W]e cannot say that the mere fact of a trailer being moved from a large warehouse early in the morning is so unusual or indicative of criminal conduct as to give probable cause for search." (A-11, A12). While not arguing that the results justify the means, it should not be forgotten that the inspector was right. This was not just any trailer leaving the Defendant's warehouse, but one specifically moved on the morning of a scheduled PCB inspection. The anonymous tip had stated drums and/or transformers of PCB oils would be moved via trailer prior to the scheduled inspection. More importantly, the Fire Department had observed drums or transformers being loaded into the specific trailer that was followed to CA&T and later opened.

On its face, the State court decision is improper under *Oregon v. Haas*, 429 U.S.714, 719, fn.4 (1975). Therein, this Court recognized that a State court may not interpret the Fourth Amendment more restrictively than the United States Supreme Court. The appellate court standard is more restrictive because it interjects an unworkable requirement for absolute certainty that evidence or contraband will be found, and rejects the practical application of this Court's directive that evidence pertaining to probable cause must be viewed in the light most favorable to the government.

Additionally, the new requirement to establish "concrete reasons" to show probable cause places the average law enforcement officer in the position of having to be a legal technician on every decision that may involve a warrantless entry. Requiring government agents to eliminate any doubt and establish, with absolute certainty, that evidence of contraband will be present, before taking any necessary action, may have a widespread, detrimental effect on the ability of the law enforcement officers to protect the public health and safety.

III. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT KNOWLEDGE OBTAINED DURING A CONSENTUAL ENTRY CONDUCTED SUBSEQUENT TO A WARRANTLESS ENTRY OF AN ADJACENT AREA IS AN "INDEPENDENT SOURCE" UPON WHICH PROBABLE CAUSE FOR A LATER WARRANT MAY BE BASED.

Information which is received through an illegal source is considered validly obtained when it also arrives through an independent source. *United States v. Silvestri,* 787 F.2d 736, 739 (1st Cir. 1986). While, in the instant case, the State asserts the initial warrantless entry was justified by probable cause and exigent circumstances, the ultimate question is whether the subsequent search pursuant to the warrant was the result of a genuinely independent source of the information and tangible evidence at issue. *Murray v. United States,* 487 U.S. 533, 542 (1988).

In this case, the State appellate court improperly expanded the fruit of the poisonous tree doctrine. The entire factual basis that established probable cause for the subsequent search warrant was evidence regarding hazardous wastes that was only observed by the affiants during intervening consentual entries of the independently locked trailers found next to the original PCB trailer. The affiants were not even present during the warrantless emergency entry of the suspect PCB trailer on November 10th. Importantly, the evidence concerning hazardous waste, which established probable cause in the affidavits for the warrant, was *only* observed in the six (6) additional, independently locked trailers adjacent to the suspect PCB trailer. The six (6) independently locked trailers were *only entered* by the EPA inspectors with Dixie's consent or pursuant to the subsequent warrant.

The consent to inspect the additional trailers was freely and voluntarily given by Dixie. The consent to enter the trailers was given by Dixie's attorney for both intervening consentual entries. After the second consentual entry was terminated due to darkness on November 15th, Dixie withdrew consent. Unquestionably, Dixie was aware of the ability to refuse consent, and executed that ability after the second consentual entry. Thus, the consent to enter was clearly free and voluntary, provided by Dixie with the full assistance of counsel.

After the initial warrantless entry of the suspect PCB trailer the State agents did not just unlock and enter the remaining six (6) locked trailers belonging to Dixie. Despite the fact that the State inspectors knew of the Defendant's prior history of improperly storing hazardous waste, as well as observed drums commonly used to store hazardous waste through holes in the exteriors of the six (6) additional locked trailers, and the fact that Dixie had lied to the owners of CA&T as to what was being stored in the trailers, the inspector stepped back and sought, and obtained, Dixie's consent to enter the additional trailers.

Eliminating evidence obtained, after a person, with assistance of counsel, contents to an inspection, expands the exclusionary rule into a wall that is used to permanently hide evidence or contraband from government authorities, instead of a shield to deter illegal police conduct.

IV. THE COURT SHOULD GRANT CERTIORARI TO AFFIRM THAT AN INDIVIDUAL MAY NOT ASSERT, AS HIS OWN, THE FOURTH AMENDMENT PRIVILEGE OF A CORPORATION, BASED SOLELY UPON THE DEGREE OF OWNERSHIP AND CONTROL THE INDIVIDUAL HAS OVER THE CORPORATION, AND NOT THE PRIVACY INTEREST OF THE INDIVIDUAL IN THE PROPERTY SEIZED.

In order to have standing to assert a Fourth Amendment Claim, a person must demonstrate a legitimate expectation of privacy in the area searched. *Rakas v. Illinois,* 439 U.S. 128 (1978); *Rawlings v. Kentucky,* 448 U.S. 98 (1980). Moreover, to successfully challenge the admissibility of evidence, a defendant must establish that *his own* Fourth Amendment rights were violated by the conduct upon which he wishes to base exclusion. *United States v. Hartley,* 486 F. Supp. 1348, 1353 (U.S.D.C.M.D. Fla. 1980). A person potentially aggrieved through evidence obtained in the search of a third party's premises has not had any of his Fourth Amendment rights infringed. *Rakas v. Illinois, supra.*

A corporation, as well as an individual, is entitled to protection against illegal search and seizure. *Silverthorne Lumber Co., Inc. v. United States,* 251 U.S. 385 (1920); *United States v. Antonelli Fireworks Co., Inc., et al.,* 53 F. Supp. 870 (D.C.W.D.N.Y. 1943). Thus, a corporation has a right to claim Fourth Amendment standing on its own behalf. *Blackie's House of Beef, Inc. v. Castillo,* 659 F.2d 1211, 1216 n.5, (D.C. Cir. 1981), *cert. denied,* 455 U.S. 940 (1982).

When a man chooses to avail himself of the privilege of doing business as a corporation, even though he is its sole shareholder, he may not vicariously take on the privilege

of the corporation under the Fourth Amendment. *Lagow v. United States*, 159 F.2d 245, 246 (2nd Cir. 1946), *cert. denied*, 331 U.S. 858 (1947). The stockholder of a corporation must demonstrate an *independent privacy interest* in the searched property before he may prevail on Fourth Amendment grounds. *United States v. Vicknair*, 610 F.2d 372, 394 (5th Cir. 1980), *cert. denied*, 449 U.S. 823 (1980). While ownership and possession of the area searched are relevant factors in determining an expectation of privacy, they are not dispositive of the expectation of privacy. *United States v. McHugh*, 769 F.2d 860, 864, (1st Cir. 1985).

In this case, the parties stipulated that the owner of the trailers used to store hazardous wastes at CA&T was the corporate Defendant Dixie. The subsequent evidence established that the only ties the individual Defendant had to the trailers was his sole ownership and control of corporate Defendant Dixie.

The appellate court established a theory of "automatic standing" allowing an individual to vicariously take on the Fourth Amendment privilege of the corporation based solely on ownership and control of the corporation, and not the actual involvement of the individual with the property that is the subject of the search. If allowed to stand, the decision means that the sole owner of a corporation may assert a "personal" expectation of privacy under the Fourth Amendment in all corporate property, regarless of its location and/or his actual contact or ties to the location and/or the property searched. This result is inconsistent with the concepts of constitutional law recognized by this Court.

CONCLUSION

For all the above reasons, the Court should grant certiorari and reverse the decision of the court below.

Respectfully submitted

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THE SUPREME COURT OF OHIO

1993 TERM
To wit: January 27, 1993

State of Ohio, Appellant,	:	Case No. 92-2281
v.	:	ENTRY
Harry C. Denune et al., Appellees.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Butler County, and the claimed appeal as of right from said court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by Brad Tammaro

(Court of Appeals Nos. CA9007128 & CA9007129)

THOMAS J. MOYER

THOMAS J. MOYER
Chief Justice

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO,	:	
	:	CASE NOS. CA90-07-128
Plaintiff-Appellee	:	CA90-07-129
Cross-Appellant,	:	
	:	OPINION
- vs -	:	09/21/92
HARRY C. DENUNE, et al.,	:	FILED IN COURT OF APPEALS
	:	BUTLER COUNTY, OHIO
Defendants-Appellants/	:	Sept. 21, 1992
Cross-Appellees.	:	Edward S. Robb, Jr., Clerk

Lee Fisher, Ohio Attorney General, Brad L. Tammaro and Philip E. Haffenden, 30 E. Broad Street, 25th Fl., Columbus, Ohio 43266-0410, for plaintiff-appellee/cross-appellant

Michael T. Gmoser, 720 Society Bank Bldg., Hamilton, Ohio 45011, for defendants-appellants/cross-appellees

CASTLE, J. Defendants-appellants, Harry C. Denune and Dixie Distributing, Inc., appeal their jury trial convictions before the Butler County Court of Common Pleas for illegal transportation, disposal, and storage of hazardous waste, failure to evaluate waste, failure to conduct analyses of waste, failure to prepare a uniform waste manifest, criminal endangering, and illegal operation of a hazardous waste facility.

Appellant Denune is the sole shareholder of Dixie Distributing, Inc. The evidence indicated that Denune made all of the substantive decisions regarding the operations of Dixie Distributing, Inc., including the decisions concerning the storage and disposal of corporate property.

On November 9, 1988, the Ohio Environmental Protection Agency (OEPA) received an anonymous telephone call indicating that a tractor-trailer containing polychlorinated biphenyls (PCBs) would be moved from the Dixie Distributing, Inc. warehouse in Springfield, Ohio. The caller said that the tractor-trailer would be moved from the warehouse immediately prior to a scheduled PCB inspection of the premises by OEPA at 9:00 a.m. on November 10, 1988.

OEPA investigators arrived at the Springfield warehouse at approximately 3:00 a.m. on November 10. At approximately 7:00 a.m.,a tractor-trailer left the warehouse, and the investigators followed.

The tractor-trailer began traveling south on I-75. The driver exited the interstate at Route 63 and stopped the tractor-trailer at a restaurant for a brief period. The vehicle resumed its course down I-75 and proceeded to the Canal Auto and Truck salvage yard in Hamilton, Ohio. The padlocked trailer was parked next to six other trailers belonging to Dixie Distributing, Inc.

The OEPA investigators conducted a visual inspection of the six trailers that had already been present at the salvage yard. The trailers had holes through which the investigators could see 55-gallon drums. The seventh, newly arrived trailer, did not have holes through which its contents could be discerned.

The investigators contacted the caretaker of the salvage yard, Edward Sweeney, and informed him that they wished to inspect the newly arrived trailer. After contacting his supervisor, Sweeney told the investigators that they could search the trailer.

The investigators cut the padlock off of the trailer and searched its interior. There they found ten transformers containing PCBs and an unlabeled 55-gallon drum. The lids of the transformers had been removed, and there were slight oil leakages from the seals. Samples were taken from the transformers and the drum.

Based on the evidence uncovered in the search of the first trailer, the OEPA investigators obtained a warrant to search the other six trailers. The search of the other trailers uncovered randomly stacked containers of paints, solvents, and similar materials, many of which were found to be hazardous pursuant to OEPA regulations. The containers were in poor condition, with many of them leaking due to the absence of lids or bung caps.

Appellants were indicted by the Butler County Grand Jury on September 11, 1989. Both appellants filed a motion to suppress the evidence obtained from the warrantless November 10, 1988 search as well as all evidence obtained as a result of that search. The Butler County Court of Common Pleas found that Denune had no standing to contest the legality of the searches, as the trailers were the property of Dixie Distributing, Inc. The court denied the motion of Dixie Distributing, Inc., concluding that OEPA's authority to inspect and investigate eliminated the requirement for a search warrant and that the search was not unreasonable.

A trial was held before the Butler County Court of Common Pleas, and the jury returned a verdict of guilty on the above-listed counts as to both appellants. Dixie Distributing, Inc. was assessed a fine of $10,000 on all counts except criminal endangering, for which it was assessed a $5,000 fine. The court further ordered that $3,500 of the fines on all counts except criminal endangering be suspended on the condition that Dixie Distributing, Inc. remove the trailers from the site and otherwise clear the premises to the satisfaction of OEPA. Dixie Distributing, Inc. was also placed on five years' probation.

Denune was sentenced to two years' imprisonment on all counts except criminal endangering, to be served concurrently. He was also assessed a fine of $10,000 on all counts except criminal endangering, for which he was assessed a $1,000 fine. The sentence of imprisonment was suspended on the condition that Denune effectunate the clean-up of the premises. The court ordered that $3,500 of the fines on each count except criminal endangering be suspended on the same condition. Denune was also placed on five years' probation.

Further, both appellants were ordered to pay investigative fees, attorney fees, and court costs associated with the case. All sums assessed against Denune and Dixie Distributing, Inc. were made the parties' joint and several obligations. The judgments against appellants were entered on June 13, 1990.

Appellants bring the instant appeal, setting forth the following assignments of error:

Assignment of Error No. 1:

THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANTS-APPELLANTS BY OVERRULING THE MOTION OF DEFENDANTS-APPELLANTS TO SUPPRESS ALL EVIDENCE SEARCHED FOR AND SEIZED ON NOVEMBER 10, 1988 WITHOUT A SEARCH WARRANT AND ADMITTING SAID EVIDENCE AT TRIAL.

Assignment of Error No. 2:

THE TRIAL COURT ERRED BY PERMITTING TESTIMONY CONCERNING ALLEGED PAST MISCONDUCT OF DEFENDANT-APPELLANT AND THE POLICE ACTION ASSOCIATED THEREWITH.

Assignment of Error No. 3:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANTS' MOTION FOR ACQUITTAL PURSUANT TO RULE 29 OF THE OHIO RULES OF CRIMINAL PROCEDURE AT THE CLOSE OF THE STATE'S CASE.

Assignment of Error No. 4:

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY INCORRECTLY INSTRUCTING THE JURY WITH RESPECT TO THE LAW TO BE APPLIED BY IT IN ITS DELIBERATION.

The state, as cross-appellant, asserts the following assignment of error:

THE TRIAL COURT ERRED BY SUSPENDING THE SENTENCES OF THE DEFENDANTS BELOW THE MANDATORY MINIMUM SENTENCES ESTABLISHED BY R.C. §3734.99(A).

In their first assignment of error, appellants claim that the trial court erred in denying the motion to suppress the evidence obtained from the November 10, 1988 warrantless search. The Fourth Amendment to the Constitution of the United States provides that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." Searches conducted without a warrant "are per se unreasonable under the Fourth Amendment — subject to only a few specifically established and well-delineated exceptions." *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514; *State v. Taylor* (Sept. 16, 1991), Clermont App. No. CA91-02-015, unreported.

It is conceded that the search challenged in the motion to suppress was conducted without a warrant. Therefore, the primary issue under the first assignment of error is the applicability of various exceptions to the warrant requirement. As a preliminary matter, however, we must address several issues raised as to the manner in which the trial court conducted the suppression hearing. The first is the trial court's conclusion that Denune lacked standing to contest the search.

It is well-settled that the protections of the Fourth Amendment relating to searches and seizures extend to commercial premises as well as homes. *Marshall v. Barlow's, Inc.* (1978), 436 U.S. 307, 312, 98 S.Ct. 1816, 1820. However, in order to successfully challenge the admissibility of evidence on Fourth Amendment grounds, a defendant must establish that his own Fourth Amendment rights were violated. *Rakas v. Illinois* (1978), 439 U.S. 128, 133-4, 99 S.Ct. 421, 424-25, rehearing denied (1979), 439 U.S. 1122, 19 S.Ct. 1035. Fourth Amendment rights may not be asserted vicariously. *Id.*

Though once expressed as a question of "standing," since *Rakas, supra,* the issue has been framed in terms of whether the defendant has a legitimate expectation of privacy in the searched property. When corporate property is searched or seized, an inidividual cannot assert the corporation's Fourth Amendment rights absent a showing that he had an independent privacy interest in the property. *United States v. Vicknair* (C.A.5 1980), 610 F. 2d 372, 394, certiorari denied (1980), 449 U.S. 823, 101 S.Ct. 83. Even a stockholder of a corporation must demonstrate an independent privacy interest in the searched property before he may prevail on Fourth Amendment grounds. *Id.*

In the case at bar, Denune did demonstrate an independent privacy interest in the searched property. As noted above, Denune was the sole shareholder of Dixie Distributing, Inc. The evidence indicated that he had sole control over the entire operation of the business. Numerous witnesses testified that no substantial decision affecting the business

could be made without Denune's authorization. Most importantly to the instant case, Denune had complete control over the movement of all equipment and inventory, including the trailer that was the subject of the warrantless search. As the state itself asserted, the action taken nominally by the corporation in causing the trailer to be taken from Springfield to Hamilton was in fact the personal decision of Denune, who handled every detail of the transportation and storage of the trailer. In short, the state itself demonstrated that Dixie Distributing, Inc. was virtually inseparable from the person of Harry Denune. Given this proof of Denune's complete control of the corporation, the state cannot be heard to assert that the identities are separable for purposes of Fourth Amendment protections. Accordingly, we will consider the issues argued under the first assignment of error as pertaining to both Denune and Dixie Distributing, Inc.

Next, appellants contend that the trial court improperly placed on them the burden of establishing a constitutional violation. The court concluded that OEPA's authority under R.C. Chapter 3734 to inspect and investigate eliminated the necessity for a warrant. It therefore placed on the defense the burden of establishing that the search was unreasonable, capricious, or arbitrary. It was the court's position that under R.C. Chapter 3734, OEPA has "carte blanche" authority to conduct searches for suspected hazardous waste violations. Appellant contends that the court's position was erroneous.

Appellant's argument is well-taken. To challenge the admissibility of evidence obtained pursuant to a warrantless search or seizure, the defendant must demonstrate the lack of a warrant and raise the grounds upon which the validity of the search or seizure is being challenged so as to give the prosecution notice of the basis for the challenge. *Xenia v. Wallace* (1988), 37 Ohio St. 3d 216, paragraph one of the syllabus. Once a defendant has demonstrated a warrantless search or seizure and adequately clarified that the ground upon which he challenges its legality is the lack of probable cause, the prosecutor bears the burden of proof, including the burden of going forward with evidence, on the issue

of whether probable cause existed for the search or seizure. *Id., paragraph two of the syllabus.*

Nothing in R.C. Chapter 3734 can be read to alter the placement of the burden of proof as set forth in *Xenia* or to eliminate the requirement for a search warrant. The prosecution cities R.C. 3734.07(C), R.C. 3734.10, and R.C. 3734.04 for the proposition that the regulatory scheme governing hazardous waste contemplates warrantless searches.

R.C. 3734.07(C) provides, in part, as follows:

> ***the director or his authorized representative, upon proper identification and upon stating the purpose and necessity of an inspection, may enter at reasonable times upon any private or public property, real or personal, to inspect or investigate, obtain samples, and examine or copy any records to determine compliance with this chapter*** [T]he director or his authorized representative may apply for, and any judge of a court of record may issue, an appropriate search warrant necessary to achieve the purposes of this chapter within the court's territorial jurisdiction.

R.C. 3734.10 provides, in part, the following:

> The director or any board of health may, upon request or upon their own initiative, investigate or make inquiries into any alleged violation or act of improper solid waste disposal, improper infectious waste transportation or treatment, or improper hazardous waste storage, transportation, treatment, or disposal.

Finally, R.C. 3734.04 provides, in part, as follows:

> The director of environmental protection shall provide for the inspection of hazardous waste facilities and of generators and transporters of

> hazardous waste, issuance of permits, and enforcement of this chapter and of rules adopted thereunder***

To the extent that these provisions address the authority of OEPA, they merely authorize the investigation, inspection, and prosecution of hazardous waste violations. No language in these sections or elsewhere in R.C. Chapter 3734 can be fairly read to abolish the warrant requirement for searches conducted by OEPA or to alter the allocation of the burden of proof in suppression hearings. In fact, R.C. 3734.07(C) specifically recognizes the existence of the warrant requirement. As the Ohio Supreme Court has recently stated, an agency of the state may not be used as a surrogate for the police to obviate the constitutional duty of obtaining a search warrant. *State v. Penn* (1991), 61 Ohio St. 3d 720, 726.

Thus, the trial court was bound to follow the rules regarding burden of proof as set forth in *Xenia*. The state argues that even under *Xenia*, appelants did not meet their burden of raising the issue of an illegal search. Specifically, it argues that the motion to suppress did not contain a sufficient factual basis to state a Fourth Amendment claim.

We find the State's argument to be without merit. Appellants' motions to suppress described the property that was searched, stated when it was searched, and averred that the search was conducted without a warrant. It further stated that the search was conducted without probable cause. These statements were sufficient to apprise the prosecution of the nature of appellants' claims and to require the burden of going forward and the burden of persuasion to be placed on the prosecution. As the court placed the burden on the defense and held that the warrant requirement had been eliminated, we find that the court erred. While the state claims that the trial court's errors were harmless, we do not agree. The conclusion that there was no requirement for a warrant, coupled with the improper

placement of the burden of proof, clearly affected the outcome of the suppression hearing. Therefore, appellants' first argument is found to be well-taken.

We now turn to the state's argument that certain exceptions to the warrant requirement are applicable in the instant case. The state's first argument is that the warrantless search was proper pursuant to the "automobile exception" first formulated in *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280. Under this exception, a warrantless search is valid where there is probable cause to believe a vehicle contains contraband and the search is conducted under exigent circumstances. *State v. Welch* (1988), 18 Ohio St. 3d 88, 92, certiorari denied (1985), 474 U.S. 1010, S. Ct. 537; *State v. Davis* (Dec. 11, 1989), Clermont App. No. CA89-03-016, unreported.

We begin with the issue of probable cause. Under the automobile exception, probable cause must be based on objective facts that could justify the issuance of a warrant by a magistrate. *Welch, supra,* at 92. This determination of probable cause involves an examination of the totality of the circumstances to make a practical, common sense decision whether there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates* (1983), 462 U.S. 213, 238-9, 103 S.Ct. 2317, 2332, rehearing denied (1983), 463 U.S. 1237, 104 S.Ct. 33; *State v. George* (1989), 45 Ohio St. 3d 325, paragraph one of the syllabus.

In the instant case, the search was not based on probable cause. The information possessed by the investigators concerning the trailer was primarily that conveyed by the anonymous caller. The caller said only that a trailer loaded with PCBs would be leaving the Springfield warehouse immediately before the scheduled OEPA inspection. While the state claims that the caller identified the specific trailer that would be moved from the facility, that claim is not supported by the record. Further, there is no indication that the caller told the investigators where the trailer would be taken. We cannot say that the mere fact of a trailer being

moved from a large warehouse early in the morning is so unusual or indicative of criminal conduct as to give probable cause to search. Even if, as the state contends, the information contained in the tip was proven to be true, that information was not sufficiently specific to provide probable cause to search the trailer.

The state also points to the manner in which the trailer was transported in arguing the existence of probable cause. It points to the fact that the trailer was heavily laden, as evidenced by its traveling slowly up hills on I-75. The state also notes the truck traveled down a bumpy road and parked near a residential area, a river, and a wildlife refuge.

We fail to see how these circumstances give rise to a suspicion of criminal activity. The fact that the trailer was heavily laden gave no indication that it was laden with hazardous waste. Similarly, the fact that the trailer was parked in a sensitive environmental area has no bearing on the investigators' belief in the nature of its contents.

Finally, the state argues that the appearance of the 55-gallon drums in the other six trailers tended to point to criminal activity on the part of appellants. The investigators questioned Sweeney as to what appellants had represented the contents of the six trailers to be. They learned from Sweeney that appellants had told Canal Truck and Auto that the trailers contained machine parts. However, the visual inspection of the six trailers revealed 55-gallon drums, and not machine parts. The state argues that this incogruity, coupled with the investigators' knowledge that such drums are commonly used to transport hazardous waste, was evidence that criminal activity was taking place.

Once again, the state's argument is unpersuasive. Even with the asserted incogruity, the investigators had no concrete reason to believe that the drums in the six trailers contained hazardous waste. Further, assuming that the presence of the drums in the other six trailers was cause for some suspicion, it did not give the officers a reasonable basis upon which to search the newly arrived trailer.

In short, viewing the totality of the circumstances, we conclude that the investigators did not have probable cause to search the trailer pursuant to the automobile exception. Nonetheless, we will proceed to address the question of exigent circumstances.

The most frequently noted exigent circumstance relating to automobiles and other vehicles is mobility, but mobility is not the only such circumstance. *United States v. Licata* (C.A.9, 1985), 761 F. 2d 537; *State v. Mills* (1992), 62 Ohio St. 3d 357. Once again, it is necessary to view the totality of the circumstances to determine if any exigency justified the warrantless search.

The first circumstance relied upon by the state is the trailer's potential mobility. We find this potential mobility to be minimal. At the point when the trailer was searched, it had been disconnected from the tractor, and the tractor had been driven from the premises. As such, there is no showing of a likelihood that the trailer would be transported from the site.

The state rests more heavily on the potential danger that the suspected hazardous substances posed to the immediately surrounding environment. It notes that the specific material suspected of being in the trailer, PCBs, was known by the investigators to pose a serious threat to the environment, in that it is highly toxic and nondegradable. The state notes that the trailer was in poor condition and was situated on a flood plain, between a river and a residential area, and in close proximity to a wildlife refuge.

Despite these considerations, the state has failed to demonstrate the existence of exigent circumstances. While the evidence did indicate that the trailer was situated in a vulnerable environmental area, there was no showing that any harm to the environment was imminent. The investigators saw no leakage from the trailer or other evidence that any chemicals were in danger of being released. Though the exterior of the trailer was in poor condition, there was no indication that immediate action was necessary to prevent

harm to the environment. The state has failed to demonstrate the existence of probable cause and that exigent circumstances prevented the investigators from obtaining a warrant. Therefore, the automobile exception to the warrant requirement is inapplicable.

The state next argues that the search of the trailer was valid pursuant to the consent exception to the warrant requirement. It is well-settled that a warrantless search is valid if conducted with the consent of the party whose person or property is being searched. *Penn, supra.* Further, a warrantless entry and search does not violate the Fourth Amendment prohibition against unreasonable searches and seizures if the officers have obtained the consent of a third party with common authority over the property that is searched. *United States v. Matlock* (1974), 415 U.S. 164, 94 S.Ct. 988.

Finally, a warrantless entry is valid when based on the consent of a third party whom the police reasonably believe to possess authority over the property, but who in fact does not. *Illinois v. Rodriquez* (1990), ___ U.S. ___, 110 S.Ct. 2793. There is no precise rule concerning the existence of this reasonable belief, as the issue of whether the basis for such authority exists "is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably." *Id.* at ___, 110 S.Ct. at 2800.

In the instant case, the state contends that, since both Sweeney and his supervisor at Canal Auto and Truck authorized the investigators to search the trailer, no warrant was required. The state does not argue that the employees had actual authority to consent to the search, but rather that the investigators reasonably believed that the employees possessed such authority.

The state's argument is not persuasive. The state places special emphasis on the fact that Sweeney contacted his supervisor before allowing the investigators to search the trailer. However, absent a reasonable belief that the

supervisor had the authority to permit the search, that factor carries no weight.

Though the record indicates that Sweeney told the investigators that his supervisor did not object to the search, it reveals no affirmative claim that anyone at the salvage yard had the authority to permit the search or that they had ever exercised such authority. Also, the reasonability of the belief that the salvage yard employees could validly authorize the search is called into doubt by the fact that the trailer was locked, and no one at the yard possessed a key. As the method of entering the trailer was by breaking the padlock, the investigators' belief that Sweeney had control over the entire premises cannot be deemed reasonable. Under these circumstances, we conclude that the search was not valid under the consent exception to the warrant requirement.

The final asserted exception to the warrant requirement is that claimed to have been created by the above-cited statutory provisions enabling the director of OEPA to investigate and prosecute violations of R.C. Chapter 3734. As we have already stated, no such statutory exception has been created. Therefore, finding no exception to the warrant requirement applicable to the instant case, we hold that the warrantless search was improper under the Fourth Amendment and that the trial court erred in denying the motion to suppress.

The state further argues that any error on the part of the trial court in denying the motion to suppress as to the trailer searched on November 10, 1988 was harmless. It argues that, as the same materials were found in the six trailers searched pursuant to the warrant, the conviction was supported by ample evidence regardless of the admission of the evidence from the first trailer.

The state's argument is not well-taken. It is well-settled that both direct and indirect products of an unlawful search are subject to exclusion from evidence. *Wong Sun v. United States* (1963), 371 U.S. 471, 83 S.Ct. 407. The question to

be resolved when it is claimed that evidence subsequently obtained is "tainted" or is a "fruit" of a prior illegality is whether the challenged evidence was "come at by exploitation of the initial illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 488, 83 S.Ct. at 417.[1]

In the case at bar, the evidence obtained from the other six trailers was a direct result of the initial illegal search. Based on the record before us, we conclude that, absent the evidence obtained in the initial search, the state would not have had a sufficient basis upon which to obtain a warrant for the subsequent searches. As noted above, even though the OEPA investigators witnessed activities that they believed to be suspicious, and noted the presence of the 55-gallon drums in the six trailers, their suspicion did not rise to the level of probable cause to search any of the trailers. Therefore, disregarding the evidence obtained from the initial illegal search, we find that there was an inadequate basis upon which to issue the warrant. As such, all evidence seized in the subsequent searches was subject to suppression.

As the evidence obtained as a result of the searches was required to be suppressed, we find that there is insufficient evidence remaining upon which to support the convictions. Absent evidence that the trailers contained hazardous waste or other hazardous substances, appellants must be discharged on all counts of the indictment, including criminal endangering. As such, the first assignment of error is sustained, the judgment of the trial court is reversed and appellants are ordered to be discharged.

Having ruled as we have on the first assignment of error, it is unnecessary to pass upon appellants' remaining assignments of error. Similarly, we need not reach the issue

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[1] Although the issue of whether the subsequent searches were tainted is not explicitly argued in the briefs, it was raised in the motion to supress and discussed in oral argument before this court.

raised in the state's cross-appeal. See App. R. 12 as amended effective July 1, 1992.

Judgment reversed and appellants discharged.

KOEHLER, P.J., concurs.

YOUNG, J., dissents.

Castle, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice pursuant to Section 6(C), Article IV of the Ohio Constitution.

YOUNG, J., dissenting. In their opinion, the majority determined that probable cause and exigent circumstances did not exist to permit a warrantless search with respect to the first trailer. I vehemently disagree. I am convinced that the warrantless search was proper pursuant to the "automobile exception" first formulated in *Carroll v. United States* (1925), 267 U.S. 132, 45 S.Ct. 280, wherein the United States Supreme Court expounded that a warrantless search is valid where there is probable cause to believe a vehicle contains contraband and the search is conducted under exigent circumstances.

With respect to the issue of probable cause, the facts, as set forth in the majority opinion and the record, plainly show that there was a fair probability that contraband or evidence of a crime would be found in the trailer in question. *See State v. George*, (1989), 45 Ohio St.3d 329. The pertinent facts indicate that the Ohio EPA scheduled a PCB inspection of Dixie Distributing's warehouse located in Springfield, Ohio on November 10, 1988. However, on November 9, 1988, the Ohio EPA received an anonymous telephone call informing them that Dixie Distributing was planning to load PCB material onto a trailer at their Teledyne warehouse in Springfield in an attempt to move the PCB material before the scheduled inspection.

The observations of the Ohio EPA at the Teledyne building confirmed the information that they received from the

anonymous caller. Two hours before the inspection was scheduled to begin, an individual arrived at the Teledyne building and drove the trailer in question from the warehouse and onto I-75. The Ohio EPA personnel observed that the trailer appeared to be heavily laden because it had trouble traveling up hill. The trailer finally stopped at the Canal Auto and Truck Salvage Yard in Hamilton, Ohio where it was parked next to six other trailers belonging to Dixie Distributing. The seven trailers were parked on a flood plain that was located between a river and a residential area, immediately next to and upstream from a wildlife refuge.

A visual inspection of the six trailers that had been present at the salvage yard showed that they had holes through which the investigators could see fifty-five gallon drums. The newly arrived trailer did not have holes through which its contents could be discerned. William Palmer, an Ohio EPA investigator, testified that through his experience and knowledge, the most common container for hazardous waste is the fifty-five gallon drum.

The details of the anonymous caller having been corroborated by the Ohio EPA personnel's observations of the trailer, coupled with William Palmer's experience and knowledge with respect to the transporting, storage and disposing of hazardous waste, clearly gave rise to probable cause to believe that the trailer contained contraband. See *United States v. Rodriquez* (C.A.5, 1988), 835 F.2d 1090.

Moreover, we find that exigent cirsumstances in the instant action required the immediate inspection of the trailer in question. In the instant action, the probable existence of an inherently dangerous chemical compound (PCBs) in a vulnerable environmental area such as Hamilton's wildlife refuge and the possible release of the cancer-causing chemical compound to the environment, created an exigency that required the immediate inspection of Dixie Distributing's trailer. As I have already indicated, there was probable cause that the trailer in question contained PCB contaminated oils. Thus, our next concern is whether these PCBs were a potential danger to the surrounding environment. Once

again, the record clearly shows that such a danger did exist. Ohio EPA personnel observed that the trailer appeared to be in poor shape as it was old and rusted with no labeling describing its contents. Moreover, since there was no information as to whether or not the contents of the trailer had been secured on its trip from Springfield to Hamilton, there was a possibility that the contents inside the trailer had tipped over or were leaking from its journey.

Finally, Ohio EPA's concern with respect to the trailer was twofold. First, they were interested in discovering whether a hazardous waste violation existed. Secondly, and more importantly, they wanted to prevent the possible release of PCBs from the trailer to the vulnerable environmental area. Courts have previously found that the possibility of explosives in an automobile constituted an exigent circumstance sufficient to justify an immediate warrantless search. See *United States v. Al-Azzawy* (C.A.9, 1985), 784 F.2d 890; *United States v. Williams* (C.A. 9, 1980), 626 F.2d 697.

Having found that there was probable cause to believe that the trailer contained contraband or other evidence, and that exigent circumstances necessitated a search of the trailer, I would have affirmed the trial court's decision holding that the facts justified the search of the trailer even without a warrant.

In finding that there was an inadequate basis upon which to issue a warrant with respect to the other six trailers, the majority quite simply did what is not within their power to do. The majority, in essence, conducted a *de novo* determination as to whether or not the affidavits in question contained sufficient probable cause upon which a judge could issue a search warrant.

In *State v. George* (1989), 45 Ohio St.3d 325, the Ohio Supreme Court set forth the guidelines that a reviewing court must follow when conducting an after-the-fact scrutiny of an affidavit submitted in support of a search warrant. In *George*, the court explained that:

> In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a [judge], neither a trial court nor an appellate court should substitute its judgment for that of the [judge] by conducting a *de novo* determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the [judge] had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the [judge's] determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.

Id. at paragraph two of the syllabus.

I find it rather extraordinary and unfortunate that the majority would ignore the holding in *George* in order to reach a conclusion that I feel is wrong. By conducting a *de novo* determination as to whether or not the affidavits contained sufficient probable cause upon which a court could issue a search warrant, the majority substituted its judgment for that of Judge Elliott. In my view, there was without question a sufficient basis upon which to issue a warrant, even after disregarding the evidence obtained from the initial, what the majority claims to be illegal search. The affidavits supplied to Judge Elliott clearly showed that there was probable cause to believe that the six trailers in question contained hazardous wastes.

Contained in the affidavits was the testimony of an investigator with the Environmental Enforcement Section of the Office of the Ohio Attorney General, Brance Johnson, and the testimony of an Environmental Engineer with the Ohio Environmental Protection Agency, Paul Pardi. In their affidavits, both stated that they were informed by Ohio EPA personnel on November 14, 1988 that six box trailers with

drummed materials were located at Canal Auto and Truck in Hamilton, Ohio. Paul Pardi stated in his affidavit that based upon his experience as a hazardous waste inspector, a partial inspection of the six trailers disclosed the presence of fifty-five gallon drums, tanks, cans and other types of containers which contained what appeared to be waste-type material such as waste oils, paints, and solvent-type substances. He further stated that several containers of what appeared to be corrosive-type waste were in a deteriorated condition and leaking. Finally, Pardi stated that these types of wastes are incompatible and that the commingling of these wastes would result in the generation of toxic fumes, fire and/or explosion.

Based upon the foregoing evidence, I once again reiterated that there was sufficient evidence in the affidavits, disregarding the so-called tainted evidence, to find that Judge Elliott had a substantial basis for concluding that probable cause to search the six trailers existed. See *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317. Thus, unlike my colleagues, I would have determined the original search to be proper and deferred to the judge's determination of probable cause and affirmed the trial court's judgment.

THE STATE OF OHIO	:	COURT OF COMMON PLEAS
	:	
Plaintiff	:	BUTLER COUNTY, OHIO
	:	
vs.	:	CASE NO. CA90-07-0128, 0129
	:	
HARRY C. DENUNE and DIXIE DISTRIBUTING COMPANY, INC.	:	TRANSCRIPT OF MOTION HEARING
	:	April 2, 1990
	:	
Defendants.	:	

APPEARANCES:

Mr. Philip Haffenden
Mr. Brad Tammaro
Assistant Attorneys General
For the plaintiff

-and-

Mr. David Winters
Mr. Richard Giovanetti
Attorneys at Law
For the defendants

Judge John R. Moser

December . . . or on November 10th, 1988.

BY THE COURT: Anything else, Mr. Giovanetti?

MR. GIOVANETTI: No, (inaudible).

BY THE COURT: You know . . . this anonymous tip and the subsequent investigation reminds of the two cases of *Illinois v. Gates.*, U.S. Supreme Court, and also a . . . case decided by Judge Markus, *State v. Woods*, decided in 1982 . . . and in both of those cases we had situations of anonymous tips and no search warrant. It was simply a letter directed to the authorities expressing the modus operandi of the suspected drug purveyors in that particular case. And it said there would be flights from Chicago to Miami, acquition of drugs, auto trips back to Chicago in a car ladened with drugs. Alerted by this anonymous tip, the police in Chicago put the car and parties under close surveillance and their comings and goings conformed with the anonymous tip. And, as the court said, not perfectly but substantially with the information in the letter. The police observed no criminal activity of any description, simply the type of travel described. The United States Supreme Court, in examining the totality of the circumstances, found out that the . . . there was . . . that constituted sufficient probable cause for a warrant at that time. Now that's the probable cause for getting the warrant.

Here we've already announced that we believe that 3734.10 alleviates the necessity of a warrant as long as it's not unreasonable, capricious or arbitrary and, we might add, as long as the authorities had probable cause. We just simply believe that this section of law exempts the necessity of getting a warrant. They can't exercise this authority under .10 in an unreasonable manner and certainly we must examine the totality of the circumstances to determine whether the authority was exercised reasonably and with probable cause.

Most certainly the anonymous tip, the subsequent investigation which coincided with the tip and the additional

information and the placement of the trailer and the location of the trailer, the suspicion that there were PCB's, the indangerment of the environment the PCB's would cause, particular because of its . . . of the dangerous location in which they were placed, would all certainly give rise to reasonable suspicion and we certainly think that the inspection was made lawfully and we would not suppress any evidence which was gained as a result of the inspection.

Now, Mr. Giovanetti, do we have anything in respect to these warrants or anything else?

Mr. GIOVANETTI: No, Your Honor, that (inaudible).

BY THE COURT: Alright, then will conclude the matter.

MR. WINTERS: Your Honor, I have . . .

BY THE COURT: Yes.

MR. HAFFENDEN: Thank you, Your Honor.

MR. WINTERS: . . . I don't care if . . . whether we're on the record or not, but I have a number of things . . .

BY THE COURT: Well . . .

MR. WINTERS: . . . just from kind of a housekeeping standpoint that . . .

MR. HAFFENDEN: I . . . I do have one further thing as to motions that were filed. There was one outstanding motion the court had not ruled on as to defendants motion to dismiss Count Three of the indictment and the State did file, in fact, file supplemental memorandum and I was curious as to whether the court had ruled on that. I'm sorry.

THE SUPREME COURT OF OHIO

1993 TERM
To wit: March 17, 1993

State of Ohio, Appellant,	:	Case No. 92-2281
	:	REHEARING ENTRY
v.	:	
Harry C. Denune et al., Appellees.	:	(Butler County)

This cause came on for further consideration upon appellant's motion for rehearing. Upon consideration of the motion of Ohio Prosecuting Attorneys Association for leave to file brief amicus,

IT IS ORDERED that said motion be, and the same is hereby, granted.

IT IS FURTHER ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

(Court of Appeals Nos. CA9007128 & CA9007129)

THOMAS J. MOYER

THOMAS J. MOYER
Chief Justice

STATE OF OHIO :
: SS AFFIDAVIT
BUTLER COUNTY :

I, Paul Pardi, being duly sworn, states as follows:

1. I am employed as an Environmental Engineer II in the Southwest District Office of the Ohio EPA.

2. My job duties and responsibilities include performing inspections related to the generation, storage, treatment, transportation and disposal of hazardous wastes to determine compliance with state and federal hazardous waste regulations. I am familiar with the state hazardous waste laws and regulations as well as the various chemical and physical properties of wastes and other materials which are hazardous wastes.

3. On November 10, 1988, in the course of performing my duties, I was by informed by Ohio EPA personnel that a box trailer containing electrical transformers and oils contaminated with polychlorinated byphenyls (PCB's) was located at Canal Auto and Truck, 2149 Canal Road, Hamilton, Ohio.

4. On November 14, 1988, I was informed by Ohio EPA personnel that 6 additional box trailers with drummed materials were also located with the box trailer described in paragraph 3 above.

5. On November 15, 1988, I assisted in an initial inspection of 7 box trailers located at Canal Auto and Truck, 2149 Canal Road, Hamilton, Ohio, which inspection was not completed due to darkness. Based upon my experience as a hazardous waste inspector, I believe the partial inspection disclosed the presence of 55 gallon drums, tanks, cans and other types of containers which contained what appeared to be waste type materials such as waste oils, paints, and solvent-type substances. Further, transformers were observed, as well as a 55 gallon drum labeled "PCB's" and numerous 5 gallon drums labeled "insulating oil, electrical".

6. According to State of Ohio records, neither Harry Denune, d/b/a Dixie Distributing Company, nor anyone else possesses a proper permit to store hazardous wastes at Canal Auto and Truck, 2149 Canal Road, Hamilton, Ohio. Storage of hazardous wastes at this location without a permit from the Ohio Hazardous Waste Facility Board violates Ohio Revised Code 3734.02(F).

7. Many types of paint wastes are solvent based and will frequently exhibit a flash point of less than 100 F and are therefore hazardous wastes as defined by Ohio Revised Code §3734.01(J) and regulations thereunder.

8. Based upon my experience as a hazardous waste inspector, I believe several of the box trailers contained what appeared to be paint and/or solvent type waste materials stored with what appeared to be corrosive type waste materials. These types of wastes are incompatible and commingling of these wastes would/could result in the generation of toxic fumes, fire and/or explosion. Several containers of what appeared to be the corrosive type wastes were in a deteriorated condition and had leaked.

9. In performing my duties, I learned that the 7 box trailers referenced in paragraphs 3, 4 and 5 above were owned by Harry Denune, d/b/a Dixie Distributing Company. Upon contacting a representative of Harry Denune, d/b/a Dixie Distributing Company, I was informed that further access by Ohio EPA to the 7 box trailers to complete the actions began on November 15th would not be permitted.

10. I have reviewed the Application for a Search Warrant in this matter and the 7 box trailers referred to in this affidavit bear the identification markings specified in said application. These are I.D. markings I observed during the partial inspection I assisted in on November 15, 1988.

Further, Affiant sayeth not.

PAUL PARDI

Paul Pardi

Sworn to before me and subscribed in my presence this 1ST day of DECEMBER, 1988.

G. H. ELLIOT

JUDGE, COURT OF COMMON PLEAS

STATE OF OHIO :
: SS AFFIDAVIT
BUTLER COUNTY :

I, Brance Johnson, being duly sworn, state as follows:

1. I am employed as an investigator with the Environmental Enforcement Section of the Office of the Ohio Attorney General. My position title is that of Special Agent and my duty station is the State Bureau of Criminal Identification and Investigation located in London, Ohio.

2. My job duties and responsibilities include assisting the Ohio Environmental Protection Agency in the investigation of illegal handling and disposal of commercial and industrial type wastes, including hazardous or toxic waste substances.

3. In the course of performing my duties I became familiar with a location known as Canal Auto and Truck, 2149 Canal Road, Hamilton, Ohio.

4. On November 10, 1988, I was notified that a box trailer containing electrical transformers and oils contaminated with polychlorinated byphenyls (PCB's) was located at the premises identified in paragraph 3 of this affidavit. I further learned that 6 additional box trailers were to be found at the same location.

5. On November 15, 1988, I observed Ohio EPA personnel performing an inspection of the 7 trailers referenced in paragraph 4 of this affidavit at the location specified in paragraph 3 of this affidavit. I was informed by Ohio EPA personnel that said trailers contained drums, tanks, buckets, and other types of containers of what appeared to be paint wastes, waste solvents, transformers, and oils apparently contaminated with PCB's.

6. I subsequently determined that the 7 trailers referenced in paragraphs 4 and 5 of this affidavit were owned by Harry Denune, d/b/a Dixie Distributing Company, located in Springfield, Ohio. I further learned that it was understood

that the storage of trailers by Harry Denune, d/b/a Dixie Distributing Company, at the location specified in paragraph 3 of this affidavit, was to only involve trailers containing machinery parts.

7. I further learned that 2 of the box trailers identified in paragraphs 4 and 5 of this affidavit arrived at the location identified in paragraph 3 of this affidavit in May of 1988, two box trailers arrived in June of 1988, two box trailers arrived the week of November 6, 1988, and one box trailer arrived November 10, 1988.

8. I have reviewed the information contained in the affidavit of Paul Pardi and I believe Paul Pardi is credible and reliable and has provided accurate information relating to possible criminal violations of Ohio's Hazardous Waste Laws.

9. I believe the activities and events described in this affidavit provide good cause to believe, and affiant does believe that evidence of violations of O.R.C. Sections 3734.02, 3734.11, and 3734.99, pertaining to the storage and/or disposal of hazardous wastes may be present at the location described in paragraph 3 above.

Further, Affiant sayeth not.

BRANCE JOHNSON

Brance Johnson

Sworn to before me and subscribed in my presence this 1st day of DECEMBER, 1988.

G. H. ELLIOT

JUDGE, COURT OF COMMON PLEAS